

Claimant worked for respondent as an order filler. In June or July 1999, claimant hit his head on an L-shaped bar that connects the racks. Claimant reported the incident, and an EMT treated the laceration on top of claimant's head. Claimant continued to work but noticed that his right arm was hurting. Claimant also reported problems with his neck and shoulder but did not fill out an accident report.

At the end of August 1999, claimant caught his shoulder on a piece of metal and after this was in constant pain. This August accident occurred during the last half hour of the shift. Claimant mentioned it to Harold, Brad, and a Spanish-speaking person whose name claimant did not know, all supervisors, but did not seek medical treatment. Claimant has not worked since approximately August 24, 1999.

Respondent sent claimant to Dr. Don B.W. Miskew. Dr. Miskew diagnosed a herniated disc and took claimant off work. Dr. Miskew also recommended surgery. Dr. Miskew's records were introduced, but he does not provide an opinion as to the cause of claimant's injury. His initial report states that claimant seems to blame the problem on the head injury in June. Dr. Miskew also states that claimant's symptoms developed insidiously at work and mentions that claimant feels it may be from pulling the heavy plastic material used to wrap the groceries.

Claimant has also been examined by Dr. Truett L. Swaim at the request of claimant's counsel. Dr. Swaim agrees with the diagnosis by Dr. Miskew, herniated disc at C5-6 and C6-7. In his letter report of January 18, 2000, he expresses his opinion that claimant's neck injury has been aggravated by claimant's work and his opinion that the subsequent medical care as well as the need for surgery are related to claimant's occupational injuries.

Respondent points primarily to two pieces of evidence as rebuttal to claimant's testimony. Respondent points to the accident report, respondent's Exhibit No. 1 to the preliminary hearing. Although the document itself is quite difficult to read, claimant testified that he filled it out and further acknowledged that it does not mention the specific incident claimant now testifies occurred in August 1999. In fact, it suggests an evolution of the right arm pain different from that given in claimant's testimony. Respondent also points to the affidavit of Mr. Charles Forrest. Mr. Forrest's affidavit indicates claimant told him about the neck pain but said there had not been a work-related injury.

The ALJ accepted as true the testimony given by claimant. The Board generally gives some deference to the ALJ's evaluation of the credibility of testimony presented live before the ALJ. The Board considers it appropriate to do so here. The only medical opinion directly on the issue supports compensability. The Board therefore finds claimant sustained injury arising out of and in the course of his employment and gave timely notice of that injury.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing order entered by Administrative Law Judge Robert H. Foerschler on March 7, 2000, and amended on March 20, 2000, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May 2000.

BOARD MEMBER

c: Keith L. Mark, Mission, KS
Gary R. Terrill, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director